

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,

Respondent,

v.

ASHENAFI WOLDU TEFFERI,

Appellant.

No. 63439-9-I

UNPUBLISHED DECISION

FILED: June 28, 2010

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Schindler, J. — Ashenafi Woldu Tefferi was convicted of rape in the second degree of a 27 year-old woman. The court sentenced Tefferi to a term of confinement followed by community custody. On appeal, Tefferi challenges a number of the conditions of community custody. We conclude that the condition allowing for a substance abuse evaluation if recommended by the sexual deviancy treatment provider or the Community Corrections Officer (CCO) is authorized by statute. However, because, as the State concedes, the conditions of community custody restricting contact with minors and prohibiting the purchase and possession of alcohol are not reasonably related to the circumstances of the offense, and the pornography-related condition of community custody is unconstitutionally vague, we remand.

FACTS

D.H. spent the evening of February 1, 2007, drinking with friends. In the early morning hours of February 2, D.H. was about to call a taxi to take her home when she noticed a taxi in the adjacent parking lot. D.H. approached the cab driver and asked for a ride. Tefferi said he was just getting off his shift, but offered to drive D.H. home in his car.

After arriving at the apartment, D.H. tried to open the passenger door but it was locked. D.H. asked Tefferi to open the door. Instead, he pinned her down, got on top of her, and forcefully kissed her. Tefferi put his hand down D.H.'s pants, momentarily penetrating her vagina with his finger. He then sat back in his seat and opened the door.

As D.H. ran to her apartment, Tefferi followed her. D.H. took a mace canister out of her purse, turned around, and aimed it at Tefferi, warning him not to come any closer. D.H. entered her apartment and slammed the door. Tefferi ran back to his car and drove away.

The next day, a friend noticed a bruise on D.H.'s lip. D.H. told her friend what had happened. The friend convinced D.H. to report the incident to the police.

Two detectives interviewed Tefferi several days after the incident. Tefferi admitted that he agreed to drive a woman home after his shift. Tefferi signed a statement. Tefferi said the woman was drunk, called him a "magic man," and that after giving the woman a ride, "[s]he kissed me and I kissed her." He also admitted that his

hand “might have involuntarily gone into her pants a small ways.” However, Tefferi stated that although said earlier stated that his hand may have gone in the woman’s pants, “now I remember it did not.”

Tefferi waived his right to a jury trial. Tefferi testified that D.H. was not the woman he gave a ride to and denied having any sexual contact with D.H. Following a bench trial, the court found Tefferi guilty of rape in the second degree. The court imposed a low-end standard range sentence of 78 months incarceration to be followed by community custody for life. The court imposed a number of the conditions of community custody recommended by the Department of Corrections (DOC).

ANALYSIS

Tefferi contends the trial court erred in imposing a number of conditions of community custody. In specific, Tefferi challenges (1) the conditions prohibiting contact with minors, (2) a condition prohibiting the purchase and possession of alcohol, and (3) a condition requiring him to undergo a substance abuse evaluation. Tefferi also contends that the condition restricting his access to pornography is unconstitutionally vague.

“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). We review whether the trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106,

110, 156 P.3d 201 (2007).

In addition to the term of confinement, Tefferi was subject to community custody, and the court is authorized to impose conditions of community custody. Former 9.94A.712 (2006); Former RCW 9.94A.712(6)(a)(i); Former RCW 9.94A.700 (4), (5) (2003). The conditions of community custody may include treatment and counseling, services, the prohibition against alcohol consumption, and “crime-related prohibitions.” Former RCW 9.94A.700(5) (c), (d), (e) (2003). A “crime-related prohibition” is defined as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted” Former RCW 9.94A.030(13) (2006).

The trial court imposed five conditions restricting Tefferi’s contact with minors.¹ Because Tefferi was convicted of raping a 27-year-old woman, he asserts that conditions 5 through 9 are not crime-related and should be stricken. The State concedes error and we accept the concession. See State v. Riles, 135 Wn.2d 326, 349-50 957 P.2d 655 (1998) (community placement condition prohibiting convicted sex offender's contact with minors was not justified where the victim was not a minor).

Condition 15 does not allow Tefferi to “purchase, possess, or use” alcohol.

¹ Condition 5 requires that Tefferi not “initiate or prolong any physical contact with children.” Condition 6. prohibits Tefferi from entering “areas/places where minors are known to congregate without the specific permission of the sexual deviance counselor or the Community Corrections Officer.” Condition 7 requires that Tefferi inform the CCO of any romantic relationships “to verify there are no victim-age children involved and that the adult is aware of [Tefferi’s] conviction history.” In addition to prohibiting contact with the victim (already prohibited by condition 3), condition 8 prohibits contact with “minor-age children” without approval of the CCO. Condition 9 requires that Tefferi “[h]old no position of authority or trust involving children.”

Tefferi acknowledges that prohibition of the consumption of alcohol is statutorily authorized, but challenges prohibition of the purchase or possession of alcohol. Under former RCW 9.94A.700(5)(d), a sentencing court is authorized to order an offender to refrain from consuming alcohol, regardless of whether alcohol contributed to the offense. See State v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258 (2003). However, other alcohol-related restrictions must be “crime-related.” Former RCW 9.94A.700(5)(e).

The State concedes that the prohibiting the possession and purchase of alcohol is not “crime-related” in this case. Because there was no evidence that Tefferi used alcohol, we accept the State’s concession that the prohibition against possessing and purchasing alcohol must be stricken.

Tefferi challenges condition 13 which requires that “[i]f directed by your sexual deviancy treatment specialist or Community Corrections Officer, undergo an evaluation regarding substance abuse at your expense and follow any recommended treatment as a result of that evaluation.” Tefferi does not challenge the requirement that he “enter into and make reasonable progress in sexual deviancy therapy.” See former RCW 9.94A.700(5)(c) (authorizing crime-related treatment or counseling). But Tefferi argues that the court lacked authority to require a substance abuse evaluation if directed by the sexual deviancy treatment specialist or CCO because it is not crime-related. We disagree with Tefferi’s argument.

Former RCW 9.94A.713(1) (2006) grants authority to the Sentencing Review

Board (Board) and DOC to impose additional “rehabilitative ” conditions of community custody and there is no requirement that these additional rehabilitative conditions must be crime-related. If imposed, the rehabilitative conditions must be based upon a “risk to community safety.” Former RCW 9.94A.713(1).

Tefferi’s reliance on State v. Jones, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003) is misplaced. In Jones, the trial court ordered alcohol counseling as a crime-related treatment under former RCW 9.94A.700(5)(c) despite the fact there was no evidence that the crime involved alcohol. Here, unlike in Jones, a substance abuse evaluation is contingent upon an assessment by the sexual deviancy treatment provider or the CCO that such an evaluation is appropriate as a rehabilitative condition. We conclude the court had the authority to impose condition 13.

Tefferi also challenges condition 10. Condition 10 provides:

Do not possess or peruse pornographic materials unless given prior approval by [the] sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.”

In Bahl, the court addressed the imposition of a community custody condition restricting access to and possession of pornographic materials. The condition did not define pornography, leaving this to the CCO’s discretion. The court held that the condition was unconstitutionally vague because it failed to provide ascertainable standards. Bahl, 164 Wn.2d at 757-58. Likewise, in State v. Sansone, 127 Wn. App. 630, 634-35, 111 P.3d 1251 (2005), this court found an identical condition of

community custody unconstitutionally vague and remanded to the trial court to impose a condition with the necessary specificity. Sansone, 127 Wn. App. at 643. The State concedes that the prohibition against access to and possession of pornography is unconstitutionally vague. We accept the State's concession and remand to the trial court to strike or revise the condition.

Tefferi argues that his counsel provided ineffective assistance by failing to object to the conditions of community custody not authorized by statute. To prevail on a claim of ineffective assistance of counsel, Tefferi must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

To demonstrate prejudice, the defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." Nichols, 161 Wn.2d at 8. If the defendant fails to establish one of the two prongs, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Tefferi cannot establish prejudice. The State conceded error with respect to seven of the eight conditions of community custody that Tefferi challenges and all of those conditions will be stricken or modified. And because the trial court did not err in imposing condition 13, Tefferi's attorney was not ineffective in failing to object.²

² In his statement of additional grounds, Tefferi appears to raise a claim with regard to defining

We affirm condition 13. We remand to strike the conditions that restrict Tefferi's contact with minors, conditions 5, 6, 7, 8, and 9, and the prohibition against possessing

the term "sexual misconduct" for purposes of the jury questionnaire. Because Tefferi waived his right to a jury trial, the questionnaire was not used. Therefore, any error with respect to the questionnaire did not prejudice him.

and purchasing alcohol contained in condition 15. Because condition 10 is unconstitutionally vague, we remand for the trial court to strike or to revise the condition to provide the necessary specificity.

Schiveller, J.

WE CONCUR:

Leach, A.C. J.

Appelwick, J.